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| P.S., Appellant |) | |
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| and |) | Docket No. 06-1029 |
| |) | Issued: March 26, 2007 |
| DEPARTMENT OF DEFENSE, |) | |
| McCLELLAN AIR FORCE BASE, |) | |
| San Diego, CA, Employer |) | |
| |) | |

Case Submitted on the Record

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On March 27, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated October 4, 2005 and January 13, 2006 reducing her compensation.

The issue is whether the Office properly reduced appellant's compensation effective October 2, 2005 based on its determination that the constructed position of cashier represented her wage-earning capacity.

On June 29, 2000 appellant, a 68-year-old cash teller, filed a traumatic injury claim that was accepted for contusions of the right knee and shoulder. She underwent surgery for a right rotator cuff tear and stopped working on February 13, 2001.

In an August 24, 2001 report, Dr. Dyson C. Hammer, a treating physician, provided a diagnosis of status post rotator cuff repair, distal clavicle excision and subacromial decompression. He released appellant to return to light duty. Dr. Hammer recommended that she be restricted from heavy lifting greater than 15 pounds; from repeated activity above shoulder level; from any lifting above shoulder level; and from any activity requiring repetitive forward flexion of the right shoulder. Appellant was placed on the periodic rolls effective October 7, 2001.

On October 18, 2001 appellant was referred for vocational rehabilitation. On April 8, 2002 she signed a vocational rehabilitation plan and award for direct placement as a counter/rental clerk or cashier, with an estimated annual income of \$14,820.00. A March 14, 2002 Labor Market Survey reflected that there was an active labor market for these positions. In an April 28, 2002 justification letter, appellant's vocational rehabilitation counselor opined that appellant was well suited for the identified positions, due to her high vocational test scores in the field of business skills and her 20 years of experience as a teller, cashier and customer service representative. The vocational rehabilitation counsel also indicated that the requirements of the positions did not exceed the restrictions outlined by her physician. According to the plan, appellant would receive job placement assistance for 90 days.

In a report dated June 11, 2002, Dr. Christopher B. Haas, a Board-certified internist, diagnosed moderate degenerative joint disease of the right knee. He opined that the accepted June 29, 2000 incident at least contributed to appellant's current pathology and symptoms. By letter dated June 14, 2002, the Office asked appellant for details regarding her right knee condition and for medical evidence explaining how her knee condition was causally related to the June 29, 2000 contusion. On June 20, 2002 the Office again informed appellant of the need for medical evidence establishing a causal relationship between the June 29, 2000 injury and her current knee condition. The Office requested information as to recommended work restrictions due to her alleged knee condition.

On October 1, 2002 a conference was held on the issue of whether appellant's right knee condition should be considered industrial for purposes of job placement.¹ By letter dated October 1, 2002, the Office informed appellant that it found the duties of cashier and counter/rental clerk to be within her medical restrictions and that she would be provided with job placement assistance for an additional 90 days. The Office further informed her that, based on the rehabilitation vocational evaluation and survey of the labor market, it determined that appellant's wage-earning capacity was \$14,820.00 per year. Appellant was further advised that at the end of the 90-day period, her compensation would likely be reduced based on that amount. On October 2, 2002 the Office denied her request to expand her claim to include her current right knee condition as causally related to the June 29, 2000 injury.

A November 30, 2002 vocational rehabilitation report reflected that appellant was provided with numerous job leads. Appellant expressed concern that employers might not want to hire a person who is 70 years old. The vocational rehabilitation counselor encouraged her to explain to the potential employers that she has a great deal of experience to bring to the work

¹ In attendance were the claims examiner; rehabilitation specialist Hubert Dunlap, vocational rehabilitation counselor, Robert Warnemuende and appellant.

place. A December 30, 2002 vocational rehabilitation report reflected that appellant's case was closed, with no offers of employment having been received. She agreed to continue the job search on her own.

On December 11, 2002 appellant filed a claim for a schedule award. On February 13, 2003 the Office medical adviser found that she had a 17 percent impairment of her right upper extremity.

A June 4, 2004 vocational rehabilitation report included an updated labor market survey for cashier and counter clerk. The counselor stated that appellant had the necessary vocational and physical skills to perform these jobs and that there was a current active market for these sedentary positions. The report reflected appellant's claims that she had been unable to obtain employment due to her age. She also stated that she was limited to driving only 5 to 10 minutes.

The Office forwarded copies of job descriptions for counter clerk and cashier, along with a statement of accepted facts to Dr. Hammer for his review. Dr. Hammer was asked to opine as to whether appellant was medically capable of performing the duties of these positions eight hours per day. He did not respond.

The Office referred appellant, together with a statement of accepted facts and the entire medical record, to Dr. Thomas J. Sabourin, a Board-certified orthopedic surgeon, for a second opinion examination as to whether she was capable of performing the duties of cashier and counter clerk as outlined in the job descriptions provided to him. In a report dated January 31, 2005, Dr. Sabourin opined that appellant was capable of working as a cashier or counter clerk for eight hours per day, within the limitations provided in his accompanying work capacity evaluation. He recommended that she be restricted from reaching above the shoulder, pushing or pulling on the right side. Appellant should also be restricted from reaching or lifting more than 20 pounds on the right side for more than three hours per day. After a thorough report of findings on physical examination and a review of her medical history, Dr. Sabourin stated that appellant's right knee injury had resolved. He indicated that she had recovered well from the right rotator cuff repair and had essentially full range of motion. Dr. Sabourin also found that appellant had early glenohumeral degenerative joint disease in the right shoulder. He noted that she had slight pain at the very top of the range of motion of the right shoulder which would not interfere with appellant's duties as a cashier or counter clerk. Dr. Sabourin found that she had full flexion and abduction.

In a closing report dated May 23, 2005, the vocational rehabilitation counselor opined that, based upon her experience, education, medical restrictions and a labor market survey, appellant was qualified for the position of cashier and that sufficient positions were reasonably available in her commuting area. He noted that appellant had not yet obtained employment, alleging that she was limited by her age, multiple physical concerns and an inability to drive more than 10 to 15 minutes at a time.

On June 30, 2005 the Office issued a notice of proposed reduction of compensation, on the grounds that appellant was no longer totally disabled and had the capacity to earn the wages of a cashier at the rate of \$320.00 per week. The constructed position was based upon her experience, education, medical restrictions and a labor market survey. Appellant was qualified

for the position and sufficient positions were reasonably available in her commuting area. The Office found that the position of cashier was medically and vocationally suitable and represented her wage-earning capacity. Utilizing the wage-earning capacity computation Form CA-816, the Office determined that appellant's compensation would be reduced to \$1,096.00 every four weeks. The Office indicated that her salary, when her injury recurred was \$621.06 per week; that the current adjusted pay rate for appellant's job on the date of injury was \$694.29 per week; and that she was currently capable of earning \$320.00 per week, the pay rate of a cashier. The Office determined that appellant had a 46 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$285.69 per week. The Office then determined that appellant had a loss of wage-earning capacity of \$335.37. The Office concluded that, based upon a 75 percent rate, her new compensation rate was \$251.53 per week (adjusted by COLA to \$274.00). The Office requested that appellant submit additional evidence or argument within 30 days if she disagreed with the proposed action.

Appellant submitted a February 28, 2005 letter from Dr. Daniel Maher, a Board-certified internist, who stated that she suffered from advanced diabetes mellitus, chronic kidney disease and progressive dementia. Dr. Maher opined that, as a result of her various conditions, appellant was unable to manage her own medications, check her blood sugar or monitor her blood pressure. He stated that she needed home health care assistance on a daily basis. In a letter dated July 13, 2005, appellant's husband indicated that she was unable to work because she had been "plagued with a lot of health problems since her injury," her health was deteriorating and she was losing her memory.

By decision dated October 4, 2005, the Office finalized the reduction in appellant's compensation effective October 2, 2005, based on her ability to earn wages as a cashier in the amount of \$320.00 per week. The Office found that Dr. Sabourin's January 31, 2005 report represented the weight of the medical evidence. The Office further stated that Dr. Maher's letter discussed nonindustrial conditions, but he provided no opinion or rationalized explanation as to whether appellant could perform the duties of a cashier.

In a letter dated December 28, 2005, appellant's attorney requested reconsideration of the October 4, 2005 decision on the grounds that appellant remained injured and unable to work. Contending that the Office had failed to consider her age in determining her wage-earning capacity, counsel stated that appellant was too old to perform the functions of cashier. He also indicated that he was submitting a December 23, 2005 report from Dr. Mark Dick, a Board-certified internist, which should carry more weight than that of Dr. Sabourin's January 31, 2005 report by virtue of its date. On December 28, 2005 appellant submitted an appeal request form requesting reconsideration of the Office's "June 30, 2005" decision. In a letter dated December 23, 2005, Dr. Dick stated that he had seen appellant approximately 10 times in the previous 2 years. He indicated that she was experiencing limitation in the range of motion of her shoulder, particularly internal rotation. Dr. Dick noted mild pain with 4/5+ strength in her shoulder. He opined that appellant was unable to perform the essential activities of a cashier. Dr. Dick stated that she was unable to lift more than five pounds repeatedly throughout an eight-hour day, due to her shoulder weakness.

By decision dated January 13, 2006, the Office affirmed its October 4, 2005 decision as to its determination that the position of cashier represents appellant's wage-earning capacity. The Office modified the decision to reflect that the physical demands of a cashier qualify as "sedentary." The Office found that Dr. Dick's report lacked probative value as it failed to provide factual or medical background findings on examination diagnosis or medical reasons to support a finding of disability. The Office further found that appellant's age did not render her unable to perform the duties of a cash teller. The claims examiner noted that on January 29, 2000 when she was 68 years old, appellant was capable of performing those duties. The Office noted that the "age" issue was addressed by the vocational rehabilitation counselor, who counseled appellant as to appropriate response during interviews and who opined that her skill, education and experience would be great assets in obtaining a job as cashier, regardless of her age.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.² Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³

Section 8115(a) of the Federal Employees' Compensation Act⁴ provides that, if actual earnings of the employee do not fairly and reasonably represent her wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of the injury; (2) the degree of physical impairment; (3) her usual employment; (4) age; (5) her qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect wage-earning capacity in her disabled condition.⁵

ANALYSIS

Based upon Dr. Sabourin's January 31, 2005 report and work capacity evaluation, the Office determined that the selected position of cashier represented appellant's wage-earning capacity, demonstrating that she could work eight hours per day in that position. The Board finds that the Office properly reduced appellant's compensation based on her ability to perform the duties of a cashier.

The Office asked Dr. Sabourin to review the job description for cashier and to opine whether appellant was capable, from a medical perspective, of performing the required duties. In his January 31, 2005 report, Dr. Sabourin opined that she was capable of working as a cashier for

² See 20 C.F.R. §§ 10.403, 10.520.

³ *Id*; see *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ 5 U.S.C. § 8115(a).

⁵ *Id*; see also *Sherman Preston*, 56 ECAB ____ (Docket No. 05-721, issued June 20, 2005); *Loni J. Cleveland*, 52 ECAB 171 (2000).

eight hours per day, provided that appellant be restricted from reaching above the shoulder; pushing or pulling on the right side, reaching or lifting more than 20 pounds on the right side for more than 3 hours per day. After a thorough report of findings on physical examination and a review of appellant's medical history, he stated that her right knee injury had resolved. He indicated that appellant had recovered well from the right rotator cuff repair and had essentially full range of motion. Dr. Sabourin also found that she had early glenohumeral degenerative joint disease in the right shoulder. He noted that appellant had slight pain at the very top of the range of motion of the right shoulder, which would not interfere with her duties as a cashier or counter clerk. Dr. Sabourin found that she had full flexion and abduction. He gave no reason why appellant could not perform the duties of cashier, which conformed with his recommended restrictions.

The remaining medical evidence of record fails to establish that appellant was unable to perform the duties of a cashier. The Office forwarded copies of job descriptions for counter clerk and cashier, along with a statement of accepted facts, to Dr. Hammer, her treating physician, for his review. Dr. Hammer was asked to opine as to whether appellant was medically capable of performing the duties of these positions eight hours per day. However, the record does not contain a response from Dr. Hammer. In a February 28, 2005 letter, Dr. Maher stated that appellant suffered from advanced diabetes mellitus, chronic kidney disease and progressive dementia and opined that, as a result of her various conditions, appellant was unable to manage her own medications, check her blood sugar or monitor her blood pressure. Dr. Maher stated that appellant needed home health care assistance on a daily basis. He did not address the accepted work-related conditions or provide an opinion or rationalized explanation as to whether appellant could perform the duties of a cashier. Therefore, his report is of diminished probative value.⁶ On December 23, 2005 Dr. Dick opined that appellant was unable to perform the essential activities of a cashier. Noting that she was experiencing limitation in the range of motion of her shoulder, Dr. Dick stated that appellant was unable to lift more than five pounds repeatedly throughout an eight-hour day, due to her shoulder weakness. Although he stated that he had seen appellant approximately 10 times in the previous two years, Dr. Dick provided no factual or medical background findings on examination or medical reasons to support a finding of disability. Therefore, his report is also of diminished probative value. The Board finds that Dr. Sabourin's well-rationalized report represents the weight of medical evidence and establishes that appellant is capable of performing the duties of a cashier.

Appellant's vocational rehabilitation counselor determined that she was able to perform the position of cashier. The counselor opined that, based upon her experience, education, medical restrictions and a labor market survey, appellant was well qualified for the position of cashier and that sufficient positions were reasonably available in her commuting area.

The Office considered the proper factors, such as availability of employment and appellant's physical limitations, usual employment, age and employment qualifications, in

⁶ There is no evidence of record indicating that appellant's newly alleged impairments were injury-related or preexisting conditions. Any incapacity to perform the duties of a selected position resulting from subsequently acquired conditions are immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. See *John D. Jackson*, 55 ECAB 465 (2004).

determining that the cashier position represented appellant's wage-earning capacity.⁷ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties of cashier and that such a position was reasonably available within the general labor market of her commuting area.

The Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Albert C. Shadrick*⁸ and codified at section 10.403 of the Office's regulations.⁹ The Office noted that her salary when her injury recurred was \$621.06 per week that the current adjusted pay rate for her job on the date of injury was \$694.29 per week; and that she was currently capable of earning \$320.00 per week, the pay rate of a cashier. The Office then determined that appellant had a 46 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$285.69 per week. The Office then determined that appellant had a loss of wage-earning capacity of \$335.37. The Office concluded that, based upon a 75 percent rate, appellant's new compensation rate was \$251.53 per week (adjusted by COLA to \$274.00). The Board finds that the Office's correctly applied the *Shadrick* formula and, therefore, properly found that the position of cashier reflected appellant's wage-earning capacity effective October 2, 2005.¹⁰

On appeal, appellant contends that it is not reasonable to conclude that a 73-year-old woman can work full time as a cashier and asks the Board to establish a rule stating that a woman of this age is not capable of handling a demanding, full-time position. Section 8115(a) of the Act¹¹ provides that, if actual earnings of the employee do not fairly and reasonably represent her wage-earning capacity or if the employee has no actual earnings, then the wage-earning capacity as appears reasonable under the circumstances is determined by a number of factors, including age.¹² Congress has, therefore, determined that age alone should not determine wage-earning capacity. Rather, it has established a "reasonableness" standard, taking into account the nature of the injury, the degree of physical impairment, usual employment, age, qualifications for other employment, availability of suitable employment; and other factors or circumstances which may affect wage-earning capacity.¹³ The Board finds that the Office has appropriately considered the required factors, including age. There is no evidence of record that establishes that age alone renders appellant incapable of performing the duties of a cashier. The Board finds that appellant has the necessary vocational skills to perform the duties of cashier.

⁷ *Loni J. Cleveland*, *supra* note 5.

⁸ 5 ECAB 376 (1953).

⁹ 20 C.F.R. § 10.403.

¹⁰ *Elsie L. Price*, 54 ECAB 734 (2003); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

¹¹ 5 U.S.C. § 8115(a).

¹² *Id.*, *see also supra* note 6.

¹³ *Id.*

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective October 2, 2005 based on its determination that the constructed position of cashier represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2006 and October 4, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 26, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board